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COURT OF CRIMINAL APPEALS
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IN THE

TEXAS COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

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TIMOTHY MARK WEST,
Appellee / Petitioner,

V.

THE STATE OF TEXAS,
Appellant / Respondent.

On Discretionary Review from
Cause No. 08-18-00190-CR, overturning the order to quash in
Cause No. 20180D03392 in the Criminal District Court Number One
of El Paso County, Texas

APPELLEE'S BRIEF

* * * * * * * * * * * * *

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STATEMENT OF THE CASE

On September 13, 2016, the State of Texas indicted Mr. Timothy Mark West on three counts of Fraudulent Possession or Attempted Possession of a Controlled Substance, to wit: Tramadol. (CR: 21–23). On June 13, 2018, the State submitted a Motion to Dismiss. (RR5: 5). Prior to dismissing its initial indictment, the State filed a new indictment charging three counts of Fraudulent Possession or Attempted Possession of a Controlled Substance, to wit: Oxycodone. (CR: 168–71). The trial court quashed the second indictment due to its lack of a tolling paragraph. (RR2: 12–15). On June 26, 2018, the State filed a third indictment alleging the same offense as the second indictment, but now containing a tolling paragraph. (CR: 8–10, 173–75). On October 15, 2018, the trial court granted Mr. West's Motion to Quash, which asserted that the statute of limitations period had lapsed and that no tolling had occurred. (CR: 113–14, 210). The State then appealed the ruling to the Eighth Court of Appeals. On February 14, 2020, the Eighth Court reversed the judgment of the trial court and remanded the case for further proceedings. *State v. West*, 597 S.W.3d 4, 10 (Tex. App. – El Paso 2020). On June 24, 2020, this Court granted Mr. West's timely petition for discretionary review.

ISSUE PRESENTED

1. Because the indictments against Mr. West allege either actual or attempted possession and because they provide specificity only as to the element on

which they differ, the controlled substance, did the Eighth Court of Appeals err in holding that the initial indictment tolled the statute of limitations?

STATEMENT OF FACTS

Appellee, Timothy Mark West, has been charged three times, through three indictments, since September 13, 2016. While all three indictments allege violations of § 481.129(a)(5)(A) of the Texas Health and Safety Code, they differ in specific elements. The initial indictment, assigned Cause Number 20160D04320, alleged three counts of Fraudulent Possession or Attempted Possession of a Controlled Substance, specifically alleging that Mr. West did "knowingly possess or attempt to possess a controlled substance, to wit: Tramadol by misrepresentation, fraud, forgery, deception, or subterfuge." (CR: 21–23). This initial indictment alleged that these possessions or attempts at possession occurred *on or about* January 21, April 2 and June 5 of 2015. (CR: 21–23). The case was set for trial on May 4, 2018, and defense counsel was prepared for trial on that date. (CR: 52, RR5: 11). Upon a motion by the State, the trial was then continued to September 7, 2018. (CR: 52). On June 13, 2018, the State submitted a Motion to Dismiss. (RR5: 5). Prior to dismissing its initial indictment, the State filed a new indictment on June 5, 2018, assigned Cause Number 20180D02900. (CR: 168–71). In this subsequent indictment, the State alleged that Mr. West possessed or attempted to possess Oxycodone, not Tramadol. (CR: 168–71). Mr. West filed a Motion to Quash on June 13, 2018, and

Visiting Judge Alcala granted the Motion to Quash on June 21, 2018, since the State had not pled a tolling paragraph. (RR2: 12–15).

The State filed a third indictment on June 26, 2018, assigned Cause Number 20180D03392. (CR: 8–10, 173–75). In the third indictment, the State again alleged fraudulent possession or attempted possession of Oxycodone on or about January 21, April 2 and June 5 of 2015. (CR: 8–10, 173–75). This time, the State pled a tolling paragraph alleging, in part, that "during a period from the 13th day of September, 2016, until the 13th day of June, 2018, an indictment charging the above offense was pending in a court of competent jurisdiction, to wit: cause number 20160D04320." (CR: 8–10, 173–75). Mr. West filed his Motion to Quash on July 9, 2018, and the Motion was heard and considered by the trial court on September 20, 2018. (CR: 113–14). On September 27, 2018, Mr. West filed a Brief in Support of Motion to Quash. (CR: 153–75). On October 15, 2018, the trial court signed an Order granting Mr. West's Motion to Quash. (CR: 210). The State appealed the ruling to the Eighth Court of Appeals. On February 14, 2020, the Eighth Court of Appeals reversed the judgment of the trial court – holding that the first and third indictments alleged the same conduct – and remanded the case for further proceedings. *West*, 597 S.W.3d at 10. On June 24, 2020, this Court granted Mr. West's timely petition for discretionary review.

SUMMARY OF THE ARGUMENT

The Eighth Court of Appeals erred when it ruled that first and third indictments against Mr. West alleged the same conduct and, therefore, the initial indictment against Mr. West tolled the statute of limitations. A person cannot be charged for an alleged offense that falls outside the statute of limitations period, the rationale being that such a prosecution would require a defendant to gather evidence and recollect events that have become obscured over the course of time. Accordingly, the statute of limitations tolls only when an initial indictment alleges the same conduct, same act, or same transaction as a subsequent indictment. This requirement ensures that a defendant will not be prejudiced by the untimeliness of the subsequent indictment. When two indictments allege the same conduct, same act, or same transaction, the first indictment will provide adequate notice to investigate and preserve the evidence central to defending against either indictment's allegations. However, when two indictments substantively diverge such that there is a realistic possibility that different evidence is centrally important to each, then an adequate defense investigation into the initial indictment's allegations will not necessarily translate into a defense against the later indictment. In this latter scenario, evidence and witnesses may be lost due to the passage of time, thereby eroding the protections offered by the statute of limitations.

The indictments against Mr. West employ largely boilerplate or verbatim statutory language but for the specific controlled substance involved, and therefore

identification of the controlled substance at issue is the crux of the notice the indictments provide. More specifically, the indictments reproduce the statutory language of the charged offense, provide for a scattershot of manner and means, use "on or about" language that diminishes the specificity of provided dates, and include the possibilities of either a completed or an incomplete attempt at possession. These ambiguities leave the named controlled substance as the principal definitive detail, and the pleading of this element changes between the indictments. Evidence relied upon to defend against the charge of possession or attempted possession of one substance will often be distinct from the evidence relied upon to defend against the charge of possession or attempted possession of an entirely different substance. As recognized by the Eighth Court, changing the alleged controlled substance at issue between the indictments enables the prosecution to focus on discrete actions that are different than those alleged in the first indictment. Therefore, the first and third indictments against Mr. West do not charge the same conduct, and the Eighth Court erred when it held otherwise.

In reaching its conclusion, the Eighth Court misconstrued the rulings and reasoning of its sister courts, as well as this Court. While this Court has made it clear that a defendant receives adequate notice when both indictments allege the same conduct, same act, or same transaction, the Eighth Court weakened that standard by holding that a defendant receives adequate notice when the indictments allege the

same *type* of conduct, same *type* of act, or same *type* of transaction. Thus, the Eighth Court's weakened standard diverges from the past rulings of this Court, which have ensured that tolling only occurs when a defendant has notice of the evidence he must preserve for his defense. The Eighth Court reached its conclusions by diminishing the relevance and importance of this Court's reasoning in past decisions, as well as turning a blind eye to the precise language of the relevant legal standards. The Eighth Court's decision departs from established precedent and undermines the protections offered by the statute of limitations. Therefore, Mr. West respectfully requests that this Court reverse the Eighth Court's flawed ruling.

ARGUMENT

I. More than three years have passed since the alleged date of offense and the statute of limitations has lapsed, unless tolled.

All three indictments charge Mr. West with violations § 481.129(a)(5)(A) of the Texas Health and Safety Code. The statute of limitations for this offense is "three years from the date of the commission of the offense." *See* TEX. CODE CRIM. PROC. art. 12.01(7). The indictments at issue allege offenses occurring on or about January 21, April 2 and June 5 of 2015. The third indictment was filed on June 26, 2018, over three years from any of the dates listed in the indictment. Therefore, unless the statute of limitations was tolled, the third indictment is fundamentally defective. *See* TEX. CODE CRIM. PROC. art. 21.02(6).

II. The Eighth Court of Appeals' decision holding that the original indictment alleged the same conduct as the third indictment rested on an incorrect reading of binding precedent.

Article 12.05(b) of the Texas Code of Criminal Procedure permits tolling of the statute of limitations "during the pendency of an indictment, information, or complaint." In *Hernandez v. State*, this Court held that a prior indictment tolls the statute of limitations when "both indictments allege the same conduct, same act, or same transaction." 127 S.W.3d 768, 771–72 (Tex. Crim. App. 2004). When both indictments allege the "same conduct, same act, or same transaction," effective defense counsel will conduct an investigation that will *necessarily* involve the facts and witnesses central to a defense to the subsequent indictment, regardless of whether or not the actual defense would be the same or even similar. In other words, "if the defense counsel has adequate notice of a charge, he can preserve those facts that are essential to his defense." *Id.* at 772. As such, Article 12.05(b)'s primary mandate is that a defendant "have adequate notice so that he may prepare a defense" to the subsequent indictment. *See id.* In determining whether such notice has been provided, the focus of the inquiry is on "the factual basis of an indictment, rather than the specific charge alleged." *Id.* at 773. Therefore, the tolling inquiry does not focus on whether the indictments allege the same statutory offenses, but whether the factual allegations provide sufficient notice so that the accused may preserve evidence necessary for his defense.

All three indictments charged Mr. West by tracking the statutory language of the charged offense, without providing any greater specificity regarding the manner or means by which he engaged in the alleged conduct. *See* TEX. HEALTH & SAFETY CODE § 481.129(a)(5)(A). The indictments alleged that Mr. West either completed or made an incomplete attempt, used "on or about" language when specifying dates, and contained only one specific and distinct fact – the particular controlled substance. (CR: 21–23, 168–71, 173–75). By including the "on or about" language, the initial indictment permitted proof of the alleged offense at any point within a three-year range: prior to the presentment of the indictment and within the three-year statute of limitations. *See, e.g.*, *Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997) ("It is well settled that the 'on or about' language of an indictment allows the State to prove a date other than the one alleged in the indictment as long as the date is anterior to the presentment of the indictment and within the statutory limitation period."). Therefore, the only specifically alleged element was the controlled substance.

Given the differing factual bases of these indictments, the Eighth Court's holding that the indictments alleged the same conduct does not comport with binding legal precedent.

II.A. The Eighth Court's decision depends on a misreading of **Hernandez.**

While a defendant receives adequate notice when a subsequent indictment

alleges the same conduct, same act, or same transaction as a previous indictment, a defendant receives inadequate notice when both indictments allege only the same *type* of conduct, same *type* of act, or same *type* of transaction. In *Hernandez*, the Court noted that "[b]oth indictments charged the appellant with *possession* of a controlled substance on or about July 19, 1997, and the names methamphetamine and amphetamine refer to the same controlled substance *found on the appellant*." *Hernandez*, 127 S.W.3d at 774 (emphasis added). The Court reasoned that, "[a]lthough the proof involved in identifying the drug would be slightly different, every other element would rest on the same proof." *Id*. The Court did not announce that every other element *could* rest on the same proof, but rather that it *would*. The facts of the *Hernandez* case guaranteed a near-complete overlap in the evidence that would be central to the defenses against either indictment. While the Court noted facts beyond those alleged in the indictment, notably that some substance had been "found on the appellant," that fact stems from the allegation of possession itself. *See id*. Often, possession charges stem from a law enforcement officer finding some substance on a defendant's person or amongst a defendant's belongings. Therefore, regardless of the alleged substance's chemical makeup, the set of actions to be investigated remains the same. As such, the initial indictment in *Hernandez* provided the type of clear notice necessary to identify and preserve the facts and witnesses essential to defend against the subsequent indictment.

The Eighth Court noted that the indictments against Mr. West "differ from those in *Hernandez*, first, because they allege not just possession but attempted possession." *West*, 597 S.W.3d at 8. The court further noted that this distinction, among others, "could theoretically allow for greater permutations in the combination of facts constituting the particular actions committed by West." *Id.* The Eighth Court even recognized that Mr. West "theoretically could have become liable under the third indictment for three entirely new and discrete actions." *Id.* However, the Eighth Court did not explore this issue further. The court did not explain how the initial indictment provided adequate notice of the allegations in the subsequent indictment, despite the noted possibility for largely divergent prosecutions and defenses under each. In fact, there are many realistic possibilities where attempting to obtain Tramadol on a specific date would not involve *any* of the same actions as attempting to obtain Oxycodone on that same date, let alone within a broader time frame.[1]

Based on the factual allegations in each indictment against Mr. West, the potential defenses to the third indictment may depend on facts and evidence with no nexus to the first indictment. First, the defense to the initial indictment may involve evidence of a valid prescription and legal possession. Mr. West may prepare for this

[1] While the dates alleged in the indictment provide at least some notice of the State's intended evidence, the "on or about" language permits evidence from a much broader time frame. Were Tramadol to have been sought or obtained on a separate date within the statutorily permitted range of time, it would be more reasonable to assume that a mistake had been made in the alleged dates than in the alleged substances.

defense by interviewing doctors and obtaining relevant medical records. That defense would need to shift with a new indictment alleging possession or attempted possession of a different substance. Second, even in a situation where Mr. West never possessed either substance, he may have never even sought Tramadol, but did seek Oxycodone through legal means. Since Mr. West would never have sought Tramadol at all, a complete defense investigation would not touch upon his pursuit of any other medications. However, he may have sought an Oxycodone prescription through fully legal means, although it ultimately was not prescribed. Therefore, with the change in pled substances under the third indictment, Mr. West would need to refocus on a different set of actions entirely, namely those surrounding his lawful pursuit of Oxycodone, through means that had never before been investigated, and likely involving parties that had never been interviewed in preparation for a defense against the initial indictment. In *Hernandez*, the allegations necessarily overlapped, whereas in the first and third indictments against Mr. West there may be no overlap in evidence at all.

As the Eighth Court recognized, it cannot be concluded that the prosecution of the first and third indictments against Mr. West *would* rely on the same proof. Therefore, *Hernandez* dictates that no tolling occurred between Mr. West's first and third indictments.

***II.B. The Eighth Court's decision depends on a misreading of* Marks.**

In *Marks v. State*, this Court further clarified the contours of "same conduct, same act, or same transaction." 560 S.W.3d 169, 170–71 (Tex. Crim. App. 2018). In *Marks*, the appellant was first indicted for acting as a guard company without a license. *Id.* at 170. At trial, the indictment was amended, over the appellant's objections, to the charge of accepting employment as a security officer to carry a firearm without a security officer commission. *Id.* Upon appeal, the State argued that the error of permitting this amendment was harmless because the State could have sought a new indictment and the prior indictment would have tolled the statute of limitations. *Id.* Both the intermediate court of appeals and this Court held that the initial indictment would not have tolled the statute of limitations. *Id.* at 170–71.

Similar to the *Hernandez* Court's focus on whether the proof would remain the same under each indictment, the *Marks* Court focused on the necessary similarities and possible differences between the factual allegations in the two indictments. *Id.* at 171. Regarding the necessary similarities, the Court inquired whether the core action would always remain the same under both sets of pled allegations. *See id.* As opposed to the initial indictment, under the amended indictment, the appellant "did not even *need to* actually provide security services — the act alleged in the original indictments. And to provide security services under the original indictments, Appellant *need not* have carried a firearm or entered into any agreement to do so." *Id.* (emphasis added). The Court then laid out potential

scenarios where a defense to the initial indictment would not preserve facts and witnesses central to possible defenses to the subsequent indictment. *See id.* The *Marks* Court imagined a scenario in which "a defendant *did* have a license to be in the guard company business and was facing one of these original indictments accusing him of not having such a license." *Id.* In such a scenario, the defendant would only prepare a defense focused on the possession of a license. Under these circumstances, the *Marks* Court asked, "[w]hat would make him think that the State was accusing him (or that he needed to defend against) the allegation that he carried or agreed to carry a firearm without having been personally commissioned to do so?" *Id.* Through this hypothetical, the *Marks* Court focused on whether an effective defense investigation into the allegations of the initial indictment would *necessarily* translate into defenses to the allegations of the subsequent indictment.

Furthermore, in Justice Keasler's dissenting opinion, joined by Justices Hervey and Newell, the focus remained on required similarities. The dissenting opinion noted that, while "the two theories of guilt contained within [the] indictments would have required different proof," the focus must be on the specific factual allegations and the type of notice provided to the defendant. *See id.* at 172–73. Despite the differences noted by the majority, Justice Keasler concluded that "it seems highly unlikely that Marks … would have sought and preserved any different defensive evidence had he known that the State would ultimately prosecute him for

an alternate Private-Security-Act violation bearing a strong resemblance to the first." *Id.* at 173. As has been noted, the same cannot be said for Mr. West. Had Mr. West known that the State would ultimately prosecute him for possession or attempted possession of a different controlled substance, he realistically would have sought and preserved a wholly different set of defensive evidence.

In its reading of *Marks*, the Eighth Court noted that "the Court appeared to reason that the gravamen of the law-offending conduct for each of the charged offenses *would not necessarily* intertwine with the gravamen of the other during the commission of either charged offenses." *West*, 597 S.W.3d at 7 (emphasis added). This reading of *Marks* correctly understands that the focus must be on *necessary* connections and on whether there exists a realistic possibility in which the initial indictment does not give notice of the substance of the subsequent indictment. However, the Eighth Court then drastically altered its interpretation of *Marks*, reasoning that the *Marks* Court "confined the application of its case to those cases in which the gravamen of law-offending conduct for the charges within a prior and subsequent indictment could *never* intertwine." *Id.* at 9 (emphasis added). In other words, the Eighth Court appears to reason that tolling should occur unless it would be impossible for the allegations in both indictments to overlap. The Eighth Court's initially stated understanding of *Marks* finds support in the law – when the two indictments "would not necessarily" overlap or intertwine, then no tolling has

occurred. The Eighth Court provides no justification or explanation for its later analysis that would permit tolling in every case where overlap between the indictments is at least possible.

Relying primarily upon *Hernandez* and *Marks*, Mr. West has argued that the defense to each indictment need not be the same, but the subsequent indictment's substance must be similar enough that effective defense counsel would have already preserved the facts and witnesses essential to defend against it. The Eighth Court did not address Mr. West's argument regarding the need to preserve evidence and the right to prepare an adequate defense. Rather than inquiring about potential differences in the facts to be preserved between the indictments, the Eighth Court simply concluded that Mr. West received "sufficient notice that 'fairly alerted' him that he could be held accountable for a specific umbrella of conduct in order for him to contemplate preserving facts that might be essential to his defense." *Id.* at 8. The Eighth Court did not explain how this notice would be sufficient if the State chose to prosecute "three entirely new and discrete actions," as it recognized was a possibility. *Id.*

Through its misreading of *Marks*, the Eighth Court applied incorrect legal standards to Mr. West's case. Rather than focusing on the necessary similarities and potential differences between the first and third indictments, the Eighth Court simply concluded that the potential differences were unimportant. Therefore, the Eighth

Court's decision does not comport with this Court's ruling in *Marks*.

II.C. The Eighth Court misunderstood the role of Marks' *hypotheticals.*

As used by the *Marks* Court, a hypothetical could help to clarify the consequences of the Eighth Court's opinion. Based on the Eighth Court's reasoning, a person could be charged in 2020 with the offense of fraudulent possession or attempted possession of a controlled substance, to wit: Tramadol. The defendant may actually have possessed Tramadol, but pursuant to a valid prescription. In preparing a defense, counsel would focus on the quantity sought and possessed by the defendant, the doctor(s) that prescribed the medication, and whether the defendant ever sought Tramadol by other means. While defense counsel would ask about the alleged dates, that questioning would generally be limited to the topics already mentioned. Even were the legal prescription and substance to have been obtained on other dates, the "on or about" language would permit that possibility. It would be unlikely that defense counsel or the defendant would consider investigating an entirely separate substance potentially sought through any number of means. What would make this person think that they could be charged a few years later with possession or attempted possession of an entirely different controlled substance?

Yet, according to the Eighth Court, that person could be charged again in 2023 with possession or attempted possession of a different controlled substance. So long

as this person is charged with the same *type* of act, *type* of conduct, or *type* of transaction, the statute of limitations would be tolled. With this change in controlled substance, the initial defense based on legal possession may no longer be possible. The change to the pled controlled substance might make irrelevant the doctors, records, and witnesses relied upon for a defense to the initial indictment. The change to the pled controlled substance could require an investigation into a completely different set actions involving different witnesses and different physical evidence. However, based on the Eighth Court's reasoning, tolling would have occurred, and that person could be charged again in 2026 with possession or attempted possession of yet another substance, all allegedly occurring at some point prior to 2020. This scenario would violate the core purpose of statutes of limitations, to "protect the accused from having to defend against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Toussie v. United States*, 397 U.S. 112, 114 (1970) (quoted by *Hernandez*, 127 S.W.3d at 772).

While the Eighth Court correctly described this type of hypothetical reasoning as one involving theoretical possibilities, it failed to recognize that these possibilities demonstrate that the indictments in this case do not allege the same conduct, same act, or same transaction. Unlike in Mr. West's case, in the cases in which Texas appellate courts have held that the statute of limitations was tolled, there were no

realistic hypothetical scenarios in which preparation for the initial defense would not carry over to the subsequent indictment. In *Ex parte Brooks,* the first indictment alleged a theft from a named individual occurring at some point in a two-year period, whereas the second indictment alleged that multiple thefts from the same individual occurred as part of a continuing course of conduct. 2011 WL 165446 at *4 (Tex. App.–Tyler, March 10, 2016). The statute of limitations was tolled because the proof of each offense would be essentially the same. In *Lenox v. State,* both indictments alleged injury to a named complainant by the specific means of striking him with a vehicle on the same date. 2011 WL 3480973 at *10 (Tex. App.–Dallas, Aug. 9, 2011, pet. ref'd). While the charge changed, the underlying factual basis did not. In *Ahmad v. State,* the initial indictment alleged the burying of a training bomb on January 26, 2002, while the subsequent indictment alleged a false report about a bomb and possession of a hoax bomb on the same date. 295 S.W.3d 731, 742 (Tex. App.–Fort Worth 2009, pet. ref'd). Again, the specific date and the particular subject matter of a bomb provided adequate notice to preserve the facts necessary for a defense to the subsequent indictment. In all three cases, there are no plausible hypotheticals in which an adequate defense to the first indictment would not carry over into a defense to the subsequent indictment.

Unlike the precedent cited by the Eighth Court, the initial indictment against Mr. West permits numerous hypothetical scenarios where the defense's preserved

evidence and witnesses would be sufficient to defend against the initial indictment and insufficient to defend against the subsequent indictment. If the indictments charged the same conduct, there were would be no such plausible scenarios. Therefore, the *Marks* Court's form of hypothetical reasoning demonstrates that the first and third indictments against Mr. West did not allege the same conduct, same act, or same transaction.

PRAYER FOR RELIEF

Appellee, Mr. Timothy Mark West, respectfully requests that this Honorable Court reverse the decision of the Eighth Court of Appeals and affirm the trial court's order to quash the indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief for the Petitioner/Appellee was sent by e-mail using the EFile system to the District Attorney's Office at DAappeals@epcounty.com and the State's Prosecuting Attorney at information@spa.texas.gov, and mailed to the Petitioner/Appellee TIMOTHY MARK WEST on this the 24th day of July, 2020. Further, 10 paper copies will be mailed to the Court of Criminal Appeals.

BY: /S/WILLIAM AHEE
WILLIAM AHEE

CERTIFICATE OF COMPLIANCE

Undersigned counsel herein states that the computer generated word count is 5,307 and as such this document is in compliance with the Texas Rules of Appellate Procedure.

BY: /S/WILLIAM AHEE
WILLIAM AHEE

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